

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 50 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

THE STATE OF GUJARAT

Vs.

ISU @ ISMAIL OSMAN.

MR S T Mehta, APP, for the Appellant - State.

MR C H VORA, ADVOCATE, for the Respondent.

CORAM: J M PANCHAL & M H KADRI, JJ.

Date of Decision: 2.12.1996.

ORAL JUDGMENT (per Kadri, J.)

By filing this appeal under S.378 of the Code of Criminal Procedure, 1973, the State of Gujarat has

challenged the judgment and order dated 29.9.1984, passed by the learned Assistant Sessions Judge, Kutch at Bhuj, in Sessions Case No. 52 of 1984, whereby the learned Assistant Sessions Judge, has acquitted the respondent of the offence under S.307 of the I.P.code.

2. Brief facts of the prosecution case are as under:

On 15.2.1984, injured Hareshkumar Jayantilal Tripathi who was working as Sub-Post Master in the post office of Village Bandiya was sitting near the bus stand on a culvert reading a book. At about 11.30 A.M., the respondent came on a bicycle with an axe and gave a blow on the head of Hareshkumar, which caused serious injury on his head. Maganlal Velji Darji, Gambhirsinh Harisinh Jadeja and Jorubha Jilubha intervened and rescued injured Hareshkumar. It is alleged that the Respondent left his cycle and ran away with the axe. Injured Hareshkumar was taken in a motor truck to Government Hospital at Netra. However, the doctor at the Government hospital was not available, and therefore, the injured was taken to one private doctor, viz. Dr. B D Ruparel. Dr.Ruparel advised that the injured should be taken to Government Hospital at Nakhatrana as it was a medico-legal case. The injured was taken in a taxi to Nakhatrana Government Hospital where primary treatment was given to him, and he was advised to be taken to Government Hospital at Bhuj. Accordingly the injured was taken to G.K.General Hospital at Bhuj where he was admitted as an indoor patient. Thereafter Head Constable Khemabhai Ambaram, who was on duty at the G K General Hospital recorded the complaint of Surendrarai Jayantilal, the brother of injured Hareshkumar. As the offence was committed within the jurisdiction of Naliya Police Station, the complaint was transferred to Naliya Police Station for investigation. As the condition of injured Hareshkumar was critical, Executive Magistrate was called to record his dying declaration. PSI Dahyabhai Bhailalbhai Parekh of Naliya Police Station took over the investigation. He prepared the panchnama of the scene of offence and seized the cycle of the respondent under a panchnama. Thereafter the accused came to be arrested by the Investigating Officer, and the muddamal axe was discovered at the instance of the accused, and the discovery panchnama under S.27 of the Evidence Act was drawn. Bloodstained clothes of injured Hareshkumar were seized and the said clothes alongwith muddamal axe and the control earth were sent to the Forensic Science Laboratory for analysis. After receiving injury certificate, and report of the Forensic Science Laboratory, the respondent came to be charge-sheeted for the offence under S.307 of the I.P.Code, in the Court of the learned JMFC, at Naliya.

As the offence under S.307 is exclusively triable by the Court of Sessions, the case came to be committed to the Sessions Court at Bhuj, which was numbered as Sessions Case No. 52 of 1984.

3. Charge Ex.1 came to be framed by the learned Assistant Sessions Judge, Kutch at Bhuj against the respondent-accused for the offence punishable under S.307 of the I.P.Code. Said charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried.

4. In order to bring home the charge to the accused, prosecution examined following witnesses :

PW 1 Ex. 9 Kantilal Nandram Joshi,
PW 2 Ex. 11 Complainant Surendrarai Jayantilal
PW 3 Ex. 12 Dr.Janakben R. Mehta,
PW 4 Ex. 16 Injured Hareshkumar Jayantilal,
PW 5 Ex. 17 Jorubha Jilubha,
PW 6 Ex. 18 Maganlal Velji,
PW 7 Ex. 19 Gambhirsinh Harisinh,
PW 8 Ex. 23 Tapubha Murvaji,
PW 9 Ex. 24 Kunjmohan Gopalan,
PW 10 Ex. 26 Hiren Damji,
PW 11 Ex. 27 Khemabhai Ambaram,
PW 12 Ex. 31 Kanubha Natvarsinh,
PW 13 Ex. 33 Dr.Bhailal D. Ruparel,
PW 14 Ex. 34 Mahobatsinh Laghubha Jadeja,
PW 15 Ex. 36 Dahyabhai Bhailalbhai Parekh,
Investigating Officer.
PW 16 Ex. 39 Dr.Subhashchandra S.Hiramadh,

In support of its case, the prosecution also produced documentary evidence in the nature of complaint, panchnama of the scene of offence, discovery panchnama of the muddamal axe, injury certificate of injured Hareshkumar, dying declaration of Hareshkumar, report of Forensic Science Laboratory, etc.

5. After recording of the prosecution evidence was over, the respondent-accused was generally questioned, and his statement came to be recorded under S.313 of the Code. The respondent, in his further statement stated that because of union rivalry he had been falsely involved in the case. It was further stated by the respondent that strike was declared in the Cement Factory by the Union of which injured Hareshkumar was the General Secretary, and as the respondent had attended the factory during the strike period as a labourer, he was falsely involved in this case by the injured.

6. After appreciating the evidence led by the prosecution, and hearing the learned Advocates for both the sides, the learned Assistant Sessions Judge, recorded the following conclusions:

- (i) Medical evidence of the Doctor who attended the injured at the G K General Hospital and the injury certificate Ex.15 prove that witness Hareshkumar sustained injuries on 15.2.1984.
- (ii) Oral evidence and the statement of the accused prove that inspite of declaration of strike in the cement factory, the respondent had attended the work at the factory during the strike period.
- (iii) Injured Hareshkumar was the General Secretary of the Labour Union of the cement factory.
- (iv) Ocular evidence of injured Hareshkumar and witness Maganlal Velji was inconsistent with the medical evidence.
- (v) Genesis of the prosecution case was doubtful.
- (vi) Complainant Surendrarai Jayantilal did not know the name of the assailant who had caused injury on the head of his brother Hareshkumar. Inspite of this fact, complainant Surendrarai gave the name of the accused in his complaint.
- (vii) Complaint of Surendrarai was recorded by Head Constable Khemabhai Ambaram, PW 11 Ex.27 after due deliberations in a piecemeal manner during the period of three hours at the G K General Hospital.
- (viii) Discovery of muddamal axe was doubtful and no blood was found on the said axe.
- (ix) Evidence of witness Maganlal Velji and injured Hareshkumar was highly unnatural and creates doubt because according to them, they were waiting for the bus to go to Netra, but in fact no bus to Netra was available at the relevant time.

7. On the basis of the above referred to conclusions the learned Judge acquitted the respondent of the offence under S. 307 of the I.P.Code, which has given rise to filing of this appeal by the State of Gujarat.

8. Learned APP Mr.S.T.Mehta has taken us through the entire evidence on record and argued that the learned Assistant Sessions Judge has erred in not relying on the evidence of injured Hareshkumar and eye-witness Maganlal Velji for convicting the respondent under S.307 I.P.Code. It is submitted that the evidence of both these witnesses is supported by medical evidence which shows that injured Hareshkumar had sustained serious injury on his head by means of an axe. He further argued that the respondent had a grudge against the injured as the respondent had attended the cement factory during the period of strike declared by the Union wherein the injured Hareshkumar was the General Secretary. It is submitted by the learned APP that the learned Asst. Sessions Judge erred in not believing the version of the prosecution witnesses and therefore, the appeal should be accepted.

9. On the other hand, it is submitted by learned Advocate Mr.C H Vora, for the respondent that the ocular evidence of the witnesses is inconsistent with the medical evidence, and therefore, the learned Assistant Sessions Judge has rightly acquitted the respondent of the offence for which he was charged, and the appeal should be dismissed.

10. The argument of the learned APP that the learned Assistant Sessions Judge has erred in not relying on the oral evidence of injured Hareshkumar and eye-witness Maganlal Velji, is devoid of any merits. The learned Judge in his reasoned order has given cogent and convincing reasons for discarding the evidence of these two witnesses. According to the evidence of these witnesses, they were waiting for bus as they wanted to go to Netra. It is pertinent to note that at the relevant time, i.e. around 11.30 a.m., no bus was available for going to Village Netra. Therefore, their evidence was rightly rejected by the learned Assistant Sessions Judge. The prosecution has deliberately suppressed the genesis of the occurrence of the incident. It is borne out from the evidence on record that the accused had attended the cement factory when strike was called by the Labour Union of which the injured was the General Secretary. Therefore, injured Hareshkumar had grudge against the respondent. The manner in which complaint against the respondent was recorded at the G K General Hospital also creates serious doubt about the alleged involvement of the respondent in the incident. It is established that the said complaint was recorded in a piecemeal manner in three hours by Head Constable Khemabhai Ambaram at the Bhuj Hospital. It is pertinent to note that complainant

Surendrarai did not know the name of the assailant of injured Hareshkumar. Inspite of that, the name of the accused has been mentioned as the person who had caused injuries.

11. Injured Hareshkumar had sustained injuries on his head. But, by that fact alone, it cannot be said that the accused had caused the said injuries on the head of injured Hareshkumar by means of an axe. Discovery of the axe is not proved beyond reasonable doubt. Furthermore, no blood was found on the said axe. The learned Counsel for the respondent has rightly submitted that the ocular evidence was inconsistent with the medical evidence on record. According to ocular evidence, the respondent caused two injuries - one on the head and one on the shoulder of injured Hareshkumar. However, two injuries were not found by the doctor on the person of injured Hareshkumar. Therefore, we are of the opinion that the oral evidence is inconsistent with the medical evidence produced on record by the prosecution. We do not find any illegality or perversity in the impugned judgment and order passed by the learned Assistant Sessions Judge, which would require interference by this court in the present acquittal appeal.

12. This is an acquittal appeal in which court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the reasons for acquittal given by the trial Court, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) GIRIJA NANDINI DEVI & ORS. vs. BIJENDRA NARAIN CHAUDHARY, AIR 1967 SC 1124, and (2) STATE OF KARNATAKA vs. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the accused. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the accused and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge.

13. For the foregoing reasons, we do not see any merits in the appeal, and the appeal is liable to be dismissed. The appeal therefore, fails and is dismissed. Muddamal articles are ordered to be disposed of in terms of the directions given by the learned trial Judge in the impugned judgment.

abraham.